

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 56

Docket No. CH-0752-08-0732-I-1

**Stephen Boyd,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

April 16, 2009

Ilyse Klavir, Esquire, Lancaster, California, for the appellant.

Kristin Langwell, Esquire, Hines, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his appeal as untimely filed with no good cause shown for the delay. For the reasons set forth below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#), REVERSE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The following facts are undisputed, except as otherwise noted. The appellant was an Information Technology Specialist for the agency. Initial Appeal File (IAF), Tab 1 at 1, Tab 7 at 7. On June 13, 2008, the agency proposed

the appellant's removal. IAF, Tab 1 at 8-11, Tab 7 at 11-13. After the appellant submitted a written response to the proposal, IAF, Tab 7 at 15-16, the agency issued a final decision dated July 18, 2008, removing the appellant effective the same day, IAF, Tab 1 at 12-13, Tab 7 at 17-18.

¶3 On August 21, 2008, the appellant filed a Board appeal of his removal and requested a hearing. IAF, Tab 1 at 1-2. The agency filed a motion to dismiss the appeal as untimely.¹ IAF, Tab 7 at 2-5. The agency argued that the appellant constructively received the decision letter when it was delivered, via Federal Express, to his address on July 21, 2008, that the filing deadline was therefore 30 days from that date, i.e. August 20, 2008, and thus, the August 21, 2008 appeal was untimely filed by 1 day. *Id.* at 2-4. In support of its motion, the agency filed a Federal Express tracking report, indicating that the letter was delivered on July 21, 2008, by being "[l]eft at [the] front door" of the "recipient address." *Id.* at 19.

¶4 The administrative judge issued an order on timeliness, notifying the appellant of the pertinent issues, and ordering the parties to file evidence and argument on the matter. IAF, Tab 8 at 1-4. The appellant responded, alleging that the agency sent its decision letter to his daughter's address rather than to the post office box where he customarily received his mail. IAF, Tab 9. He alleged that his daughter received the Federal Express package on July 21, 2008, and she informed the appellant on July 22, 2008, that she had received the package, but the appellant was unable to retrieve it until July 23, 2008. *Id.* at 2. The appellant therefore calculated his 30-day filing deadline from July 23, 2008, his date of actual receipt, and determined that the filing deadline was August 22, 2008. *Id.* The agency filed a reply, alleging that the appellant supplied his daughter's

¹ The agency's motion incorrectly characterized the timeliness issue as a jurisdictional matter. IAF, Tab 7 at 2-3; *see generally Hamilton v. Merit Systems Protection Board*, [75 F.3d 639](#), 643 (Fed. Cir. 1996).

address for purposes of mailing, and that the filing period should be calculated from July 21, 2008, because the appellant constructively received the package on that date, when it was received by his daughter. IAF, Tab 10 at 2-3, 6. It argued that the appellant failed to establish that the appeal was timely filed, or that good cause existed for the delay. *Id.* at 2-4.

¶5 Without conducting a hearing, the administrative judge issued an initial decision, dismissing the appeal as untimely filed. IAF, Tab 11 (ID) at 1, 4. She found that the filing time limit began to run on July 21, 2008, the date that the appellant's daughter received the agency's decision letter "at the address the appellant provided." ID at 2. She found, therefore, that the filing deadline was August 20, 2008, and thus, the appellant's August 21, 2008 appeal was untimely by 1 day. *Id.* She also found that, although the filing delay may have been minimal, the appellant failed to show good cause for the delay, and "[h]is negligence in computing the filing deadline does not excuse his untimely filing." ID at 3-4.

¶6 The appellant filed a petition for review, arguing that the administrative judge erred in finding that he constructively received the agency's decision letter on July 21, 2008, that the filing time limit began to run when he actually received the letter on July 23, 2008, and that the appeal was therefore timely filed. Petition for Review File (PFRF), Tab 5 at 10-16. He also argues, in the alternative, that his untimely filing should be excused due the agency's alleged delay in delivering the decision letter. *Id.* at 16-18. The agency filed a response, arguing that the petition for review should be denied because the appellant failed to provide any new and material evidence or establish that the administrative judge made any error of law. PFRF, Tab 6 at 3-5.

ANALYSIS

¶7 An appellant must file his appeal no later than 30 days after the effective date of the action being appealed, or 30 days after the date he receives the

agency's decision, whichever is later. [5 C.F.R. § 1201.22\(b\)\(1\)](#). The appellant asserts that his appeal is timely because he filed it within 30 days of his receipt of the agency's decision on July 23, 2008. PFRF, Tab 5 at 16 & n.6. In support of his claim, he submitted an unsworn statement below, suggesting that the address at which his daughter received the agency's decision letter, i.e. her own address, was not the appellant's address of record.² IAF, Tab 9. The agency, however, produced an e-mail from a Human Resources Liaison, suggesting that the appellant's daughter's address was his address of record. IAF, Tab 10, Ex. B.

¶8 Because there is a factual dispute regarding the appellant's address of record, the Board may not resolve the issue without a timeliness hearing. *See Hamilton v. U.S. Postal Service*, [79 M.S.P.R. 354](#), 357 (1998) (if an appellant can establish a factual dispute as to whether he timely filed his appeal, and he requested a hearing, he is entitled to a timeliness hearing); *see also Stout v. Merit Systems Protection Board*, [389 F.3d 1233](#), 1241-42 (Fed. Cir. 2004) (where the appellant requested a hearing and raised allegations that, if true, would have established that there was good cause for his filing delay, the administrative judge erred in dismissing the appeal as untimely filed without a hearing). However, we decline to remand this appeal for further adjudication on the issue

² Under Board precedent, an individual may be deemed to have constructively received a document for the purposes of triggering a filing period when the document was received by a relative of that individual at the individual's address of record. *See, e.g., White v. Department of Justice*, [103 M.S.P.R. 312](#), ¶¶ 3, 9 (2006) (receipt by the appellant's mother-in-law at the appellant's residence), *aff'd*, 230 F. App'x 976 (Fed. Cir. 2007); *Crearer v. Department of Justice*, [84 M.S.P.R. 434](#), ¶¶ 5-6 (1999) (receipt by the appellant's daughter at the address that the appellant provided in his appeal); *see also Anderson v. Department of Transportation*, [735 F.2d 537](#), 541 (Fed. Cir. 1984) (receipt by the appellant's mother at the address furnished by the appellant); *Cunningham v. Department of Transportation*, [35 M.S.P.R. 674](#), 676-77 (1987) (receipt by the appellant's mother at the address that the appellant provided in his appeal); *cf. Horton v. Department of the Navy*, [105 M.S.P.R. 332](#), ¶ 10 (2007) (the appellant did not constructively receive the agency's decision letter, which was sent to an address that he did not provide as a mailing address, and was received by a person with whom he had "no relationship").

because we find that, even if the appeal was untimely, the appellant has shown good cause to waive the filing deadline. *See Shiflett v. U.S. Postal Service*, [839 F.2d 669](#), 670-74 (Fed. Cir. 1988) (the Board may grant or deny the waiver of a time limit for filing an appeal, in the interest of justice, after considering all the facts and circumstances of a particular case). The Board may find good cause to waive its filing deadline based on undisputed facts. *See, e.g., Estate of Kravitz v. Department of the Navy*, [110 M.S.P.R. 97](#), ¶ 19 (2008).

¶9 To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table); *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). Even assuming that the appellant should be deemed to have received the decision letter on July 21, 2008, for purposes of calculating the filing period under [5 C.F.R. § 1201.22](#)(b), the appeal was filed, at most, 1 day late, which is a minimal delay. *See Coleman v. Department of the Treasury*, [88 M.S.P.R. 266](#), ¶ 8 (2001) (filing delay of 1 day was minimal).

¶10 The appellant's excuse for any untimeliness, i.e. his miscalculation of the filing deadline, is reasonable because he did not receive adequate notice of how to calculate the deadline. The agency's decision letter did not comply with [5 C.F.R. § 1201.21](#)(a)(1)³ to the extent that it failed to provide the appellant with

³ Section 1201.21(a)(1) provides, in pertinent part, that "[w]hen an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with [among other things] . . . [n]otice of the time limits for appealing to the Board [and] the requirements of § 1201.22(c)."

proper notice of the time limits for appealing to the Board or proper notice of the requirements of [5 C.F.R. § 1201.22\(c\)](#).⁴ The decision letter failed to inform the appellant of the time limit for filing a Board appeal in the event that he did not receive the decision letter until after the effective date of his removal, *see* [5 C.F.R. § 1201.22\(b\)\(1\)](#), and it makes no reference to the requirements of [5 C.F.R. § 1201.22\(c\)](#), IAF, Tab 7 at 17-18. Although the decision letter states that it was accompanied by a copy of the Board's regulations, *id.* at 18, under these circumstances, providing a copy of the Board's regulations would not satisfy the agency's obligations under [5 C.F.R. § 1201.21\(a\)\(1\)](#), *see Walls v. Merit Systems Protection Board*, [29 F.3d 1578](#), 1583 (Fed. Cir. 1994) (the agency's decision letter, which was ambiguous as to whether the filing time limit was calculated using calendar days or working days, did not satisfy the agency's notice obligation under [5 C.F.R. § 1201.21\(a\)](#) (1993), and the agency could not cure the deficiency by merely appending a copy of Board's regulations to its decision letter). There is nothing in the record to indicate that the agency provided the appellant with any notice on how to compute the time limit based on the date of his receipt of the decision letter, or that it informed the appellant that the filing period might be deemed to start prior to the date of his actual receipt. *See Shiflett*, 839 F.2d at 674 (the agency failed to meet its obligations under 5 C.F.R. § 1201.21 (1985), where, among other things, the decision letter did not give notice of the time limits for appealing to the Board or how to compute the time within which an appeal must be filed).

⁴ [5 C.F.R. § 1201.22\(c\)](#) provides as follows:

Timeliness of appeals. If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

¶11 We also find that the appellant acted diligently and with ordinary prudence under the particular circumstances of his case. *See Alonzo*, 4 M.S.P.R. at 184 (to establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case). It is undisputed that the appellant did not actually receive the agency's decision letter until July 23, 2008. IAF, Tab 9 at 2. He filed his appeal 29 days later. IAF, Tab 1 at 1. Thus, in the absence of adequate notice of the relevant time limits, the appellant acted diligently in filing the appeal within the time limits as he understood them. *See Walls*, 29 F.3d at 1582 (the appellant demonstrated due diligence and ordinary prudence in filing the appeal within the regulatory time period as construed by him); *Fitzpatrick v. Department of State*, [71 M.S.P.R. 318](#), 320-21 (1996) (pro se appellant's misconstruction of the filing period was a reasonable excuse for his 1-day delay in filing his appeal); *see also Coleman*, [88 M.S.P.R. 266](#), ¶ 8 (pro se appellant established good cause for the minimal 1-day delay in filing her appeal where medical evidence supported her claim of stress-related depression and she was confused as to the filing deadline because she was unable to locate a copy of the agency's decision letter). Given the inadequate notice, the appellant's pro se status, his diligence in pursuing his appeal rights, and the minimal length of what was at most a 1-day delay, we find that the appellant has shown good cause for any filing delay.

¶12 Upon an appellant's showing of good cause for the untimely filing of his appeal, waiver of the filing deadline is appropriate absent a showing of substantial prejudice caused to the agency by the delay in filing. *See Walls*, 29 F.3d at 1583-84; *Alonzo*, 4 M.S.P.R. at 184. Because the appellant has shown good cause for an untimely filing, and because the agency has made no showing

of substantial prejudice caused by what was at most a 1-day filing delay, we waive the filing deadline.⁵

ORDER

¶13 Accordingly, we REMAND the appeal to the regional office for further adjudication.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

⁵ Having waived the filing deadline, we decline to reach the appellant's other arguments on review.